

2000

The State of Utah v. Tara Kay Mast : Brief of Appellant

Utah Court of Appeals

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_ca2



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Jeane B. Inouye; Mark L. Shurtleff; Utah Attorney General; Attorney for Appellee.

Heath Johnson; Jared W. Elkridge; Salt Lake Legal Defender Assoc.; Attorneys for Appellant.

Recommended Citation

Brief of Appellant, *Utah v. Mast*, No. 20000889 (Utah Court of Appeals, 2000).
https://digitalcommons.law.byu.edu/byu_ca2/2938

This Brief of Appellant is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

IN THE UTAH COURT OF APPEALS

THE STATE OF UTAH, :
Plaintiff/Appellee, :
v. :
TARA KAY MAST, : Case No. 20000889-CA
Priority No. 2
Defendant/Appellant. :

BRIEF OF APPELLANT

This is an appeal from a judgment for the payment of restitution pursuant to Utah Code Ann. § 76-3-201(4)(a)(i)(1999), after a conviction of theft by receiving stolen property, a third degree felony, in violation of Utah Code Ann. § 76-6-408(1999), in the Third Judicial District Court, State of Utah, the Honorable Roger A. Livingston, Judge, presiding.

HEATHER JOHNSON (6934)
JARED W. ELDRIDGE (8176)
SALT LAKE LEGAL DEFENDER ASSOC.
424 East 500 South, Suite 300
Salt Lake City, Utah 84111

Attorneys for Appellant

MARK L. SHURTLEFF (4666)
UTAH ATTORNEY GENERAL
Heber M. Wells Building
160 East 300 South, 6th Floor
P.O. Box 140854
Salt Lake City, Utah 84114-0854

Attorney for Appellee

FILED
Utah Court of Appeals

JAN 11 2001

Paulette Stang
Clerk of the Court

IN THE UTAH COURT OF APPEALS

THE STATE OF UTAH, :
 :
 Plaintiff/Appellee, :
 :
 v. :
 :
 TARA KAY MAST, : Case No. 20000889-CA
 : Priority No. 2
 Defendant/Appellant. :

BRIEF OF APPELLANT

This is an appeal from a judgment for the payment of restitution pursuant to Utah Code Ann. § 76-3-201(4)(a)(i)(1999), after a conviction of theft by receiving stolen property, a third degree felony, in violation of Utah Code Ann. § 76-6-408(1999), in the Third Judicial District Court, State of Utah, the Honorable Roger A. Livingston, Judge, presiding.

HEATHER JOHNSON (6934)
JARED W. ELDRIDGE (8176)
SALT LAKE LEGAL DEFENDER ASSOC.
424 East 500 South, Suite 300
Salt Lake City, Utah 84111

Attorneys for Appellant

MARK L. SHURTLEFF (4666)
UTAH ATTORNEY GENERAL
Heber M. Wells Building
160 East 300 South, 6th Floor
P.O. Box 140854
Salt Lake City, Utah 84114-0854

Attorney for Appellee

TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
NATURE OF THE PROCEEDINGS AND JURISDICTION	1
STATEMENT OF THE FIRST ISSUE, STANDARD OF REVIEW, AND PRESERVATION OF THE ARGUMENT	1
STATEMENT OF THE SECOND ISSUE, STANDARD OF REVIEW, AND PRESERVATION OF THE ARGUMENT	2
RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS	3
STATEMENT OF THE CASE	4
STATEMENT OF THE FACTS	5
SUMMARY OF THE ARGUMENTS	7
ARGUMENT	
I. BECAUSE THE RESTITUTION STATUTE, UTAH CODE ANN. § 76-3-201, REQUIRES THE SENTENCING COURT TO FOCUS ON ADMISSIONS, AND NOT ON INFERENCES OR AN UNSPECIFIED "CIVIL STANDARD," THE RESTITUTION ORDER IMPOSED UPON MS. MAST WAS ERRONEOUS	9
II. THE ORDER IMPOSING RESTITUTION VIOLATED PROCEDURAL DUE PROCESS BECAUSE MS. MAST, WHO DID NOT ADMIT RESPONSIBILITY FOR THE RELATED BURGLARY, WAS NOT CHARGED WITH, PROVEN GUILTY OF, OR CONVICTED OF THE BURGLARY	18
CONCLUSION	23
Addendum A: Sentence, Judgment, Commitment	
Addendum B: Utah Code Ann. § 76-3-201 (1999)	

TABLE OF AUTHORITIES

FEDERAL CONSTITUTIONAL PROVISION

U.S. Const. amend. V 3, 19

FEDERAL CASE

Chapman v. United States, 500 U.S. 453 (1991) 19

STATE CONSTITUTIONAL PROVISION

Utah Const., art. 1 § 7 3, 19

STATE STATUTES

Utah Code Ann. § 76-3-201 (1999) . 1-2, 4-5, 8-11, 13-16, 21, 23

Utah Code Ann. § 76-6-408 (1999) 1, 4-5

Utah Code Ann. § 76-6-501 (1999) 4

Utah Code Ann. § 78-2a-3(2)(e) (1999) 1

STATE CASES

In the Matter of Cache Valley, 587 P.2d 525 (Utah 1978) . . . 21

Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963) 19

State v. Depaoli, 835 P.2d 162 (Utah 1992) 16

State Ex Re. N.K.C., 1999 UT App. 345, 995 P.2d 1 10

State v. Galli, 967 P.2d 930 (Utah 1998) 10, 14, 17

State v. Garcia, 866 P.2d 5,6 (Utah Ct. App. 1993)	2
<u>State v. Gomez</u> , 887 P.2d 853 (Utah 1994)	8, 16, 21-22
<u>State v. Howell</u> , 707 P.2d 115 (Utah 1985)	22
<u>State in Interest of Schroeder</u> , 598 P.2d 373 (Utah 1979)	21
<u>State v. McBride</u> , 940 P.2d 539 (Utah Ct. App. 1997)	2, 8, 12-18
<u>State v. Morgan</u> , 2000 UT App. 48, 997 P.2d 910	3
<u>State v. Robinson</u> , 860 P.2d 979 (Utah Ct. App. 1993)	16, 19
<u>State v. Sanwick</u> , 713 P.2d 707 (Utah 1986)	21
<u>State v. Simonette</u> , 881 P.2d 963 (Utah 1994)	17
State v. Voetberg, 781 P.2d 387, 389 (Or. App. 1989)	8, 9
<u>State v. Watson</u> , 1999 UT App. 273, 987 P.2d 1289	7, 9, 10, 13-17

IN THE UTAH COURT OF APPEALS

THE STATE OF UTAH, :
Plaintiff/Appellee, :
v. :
TARA KAY MAST, : Case No. 20000889-CA
Priority No. 2
Defendant/Appellant. :

NATURE OF THE PROCEEDINGS AND JURISDICTION

This is an appeal from a final judgment¹ for the payment of restitution pursuant to Utah Code Ann. § 76-3-201(4)(a)(i)(1999), in the Third Judicial District Court, State of Utah, the Honorable Roger A. Livingston, Judge, presiding.

Jurisdiction is conferred upon this Court pursuant to Utah Code Ann. § 78-2a-3(2)(e)(1999), which grants this Court jurisdiction in criminal cases not involving a conviction for a first degree or capitol felony. Appellant Tara Kay Mast ["Ms. Mast"] was convicted of theft by receiving stolen property, a third degree felony, in violation of Utah Code Ann. § 76-6-408(1999).

STATEMENT OF THE FIRST ISSUE, STANDARD OF REVIEW, AND
PRESERVATION OF THE ARGUMENT

Issue: Did the trial court err in its interpretation of the

¹A copy of the minutes of the "Sentence, Judgment, Commitment," R. 45-47, is attached as Addendum A.

restitution statute, Utah Code Ann. § 76-3-201(4)(a)(i)(1999), by ordering Ms. Mast to pay \$5,090 in restitution related to a burglary which she did not admit responsibility for, was not charged with, and did not plead guilty to?

Standard of Review: In reviewing a trial court's order of restitution this Court generally examines whether the "trial court exceed[ed] the authority prescribed by law or abuse[d] its discretion.'" State v. McBride, 940 P.2d 539, 541 (Utah Ct. App. 1997) (quoting State v. Robinson, 860 P.2d 979, 980 (Utah Ct. App. 1993)). However, where the propriety of the order depends upon interpretation of the governing statute, this Court "accord[s] a lower court's statutory interpretations no particular deference but assess[es] them for correctness, as [with] any other conclusion of law.'" Id. (quoting State v. Garcia, 866 P.2d 5,6 (Utah Ct. App. 1993)).

Preservation of the Argument: The basis for this appeal is preserved on the record at R. 71 [8-9].

STATEMENT OF THE SECOND ISSUE, STANDARD OF REVIEW, AND
PRESERVATION OF THE ARGUMENT

Issue: Did the order to pay \$5,090 in restitution, where there was neither an admission of responsibility nor a conviction of the underlying crime, violate constitutional guarantees of due

process?

Standard of Review: "'On review, we give no deference to the trial court's determination that defendant's due process rights were not violated; however, we presume that the factual findings underlying that determination are correct.'" State v. Morgan, 2000 UT App. 48 ¶8, 997 P.2d 910 (quoting State v. Parra, 972 P.2d 924, 926-27 (Utah Ct. App. 1998)).

Preservation of the Argument: The basis for this appeal is preserved at R. 71 [9-10].

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The following provision from the United States Constitution is relevant on appeal. The Fifth Amendment provides, in pertinent part:

. . . nor shall any person . . . be deprived of life, liberty, or property, without due process of law . . .

U.S. Const. amend. V.

The following provision from the Utah Constitution is relevant on appeal. Article 1, section 7 provides:

No person shall be deprived of life, liberty or property, without due process of law.

Utah Const., art. 1 § 7.

The following statute is determinative of the issue on appeal.

Restitution, Utah Code Ann. § 76-3-201 (1999)

The full text of this statute is provided in Addendum B.

STATEMENT OF THE CASE

Ms. Mast was charged by information with one count of forgery, a third degree felony, in violation of Utah Code Ann. § 76-6-501(1999), and one count of theft by receiving stolen property, a third degree felony, in violation of Utah Code Ann. § 76-6-408(1999). R. 2-4. The forgery charge was dismissed, R. 2, R. 16-22, and Ms. Mast pled guilty to the charge of theft by receiving stolen property. R. 23-24. Ms. Mast was sentenced on 28 August 2000 to three years of probation. R. 46. As a condition of probation, Ms. Mast was ordered to pay "restitution as determined by Probation Officer." R. 47. The judge clarified during the sentencing that restitution included the amount of \$5,090, the total value of property that had been stolen from Mr. Curtis Belnap ["Mr. Belnap"] during a burglary of his house. R. 70 [4, 9].

Ms. Mast made a motion to alter or amend judgment, asking the trial court to strike "approximately \$5,000 of restitution related to a burglary that Ms. Mast has never been charged with,

convicted of, nor admitted responsibility to." R. 48.² A hearing was held on 25 September 2000. R. 71. At the hearing, Ms. Mast argued that under the restitution statute, Utah Code Ann. § 76-3-201(4)(a)(i), she should be responsible only for those items she was in possession of, and not all of the property taken in the burglary. R. 71 [8-9]. The State countered that "the property is a package as a whole and she's got part of it, she should get to pay for all of it." R. 71 [9]. The trial court denied Ms. Mast's motion. R. 65. Ms. Mast filed a timely notice of appeal. R. 54-55.

STATEMENT OF THE FACTS

The "Official Version of Offense" in the presentence investigation report indicates the following:

On 3 February 2000 a deputy from the Salt Lake County Sheriff's Office responded to a call from the Super Target store at 7025 South Park Center Drive. R. 72 [2]. Upon his arrival he was told that store security personnel had detained someone, later identified as Ms. Mast, who had presented a stolen check in the amount of \$109.75 for payment of her selections. Id. The check was drawn on the account of Mr. Belnap, whose house in

² The "Motion to Alter or Amend Judgment" is attached as Addendum C.

Holladay had been burgled. Id.

The deputy questioned Ms. Mast. After a few minutes, she indicated that she wanted to visit the restroom, and he requested that she give him a "small black pouch" to check. Id. She complied. The deputy discovered four men's rings and a gold pocket watch, which Ms. Mast indicated were hers. Mr. Belnap was contacted and he identified the jewelry as his property. Id.

The "Official Version of Offense" indicates that "[a]fter being advised of her Miranda rights, Ms. Mast stated a male friend had given her the checks and the jewelry, but she could not remember his name or provide a description of him. She said she was at the store with the friend and her 14-year-old daughter. She advised the male individual had left the store and told her daughter to tell her to pay for the items with one of the checks he had given her. The defendant stated she knew the checks were stolen. She said she knew Mr. Belnap but denied any knowledge of the burglary." Id.

On 11 May 2000 Ms. Mast pleaded guilty to one count of theft by receiving stolen property. R. 16-24. She admitted to being in possession of four "rings and a pocket watch [together] worth \$1,020.00." R. 17. She did not, however, admit responsibility for the burglary. See R. 16-24. Ms. Mast was sentenced to three years of probation, with the condition that she pay restitution to Mr.

Belnap in the amount of \$5,090. R. 46-47, R. 70 [9].

SUMMARY OF THE ARGUMENTS

In ordering Ms. Mast to pay restitution for losses related to the burglary of Mr. Belnap's house, the sentencing court misinterpreted Utah Code Ann. § 76-3-201(1999). Under section 76-3-201, restitution may be ordered only if a defendant "has been convicted of a crime that resulted in pecuniary damages and agrees to pay restitution or admits to the criminal conduct." State v. Watson, 1999 UT App. 273 ¶3, 987 P.2d 1289. The sentencing judge must focus solely upon the "firmly established admission[s] of responsibility" and may not order restitution based upon further inference. Id. ¶5.

Here, Ms. Mast admitted only that she had been in possession of some items previously taken in the burglary of Mr. Belnap's house. She has continually maintained that she had no knowledge of the burglary, did not participate in the burglary, and did not know who committed the burglary. See R. 16-22, R. 70 [4], R. 72[2-3]. The sentencing court, in ordering Ms. Mast to pay restitution for the entire amount of loss from the burglary, erred by inferring responsibility based upon her admission of theft by receiving stolen property combined with her inability to provide further information about the burglary.

The court also erred in finding that Ms. Mast's "criminal activity" of theft by receiving stolen property met an unspecified "civil standard" required to impose restitution. R. 71 [12-13]. Where pecuniary damages stem from a crime separate from the crime admitted by the defendant, the focus is on the specific admissions made to the court, and not on an unspecified "civil standard." Even applying the modified "but for" test sometimes used to find responsibility for losses under section 76-3-201(4)(a)(i), State v. McBride, 940 P.2d 539, 544 (Utah Ct. App. 1997), the order for restitution was erroneous. It cannot be said that "but for" Ms. Mast's possession of checks, four rings, and a pocket watch taken in the burglary of Mr. Belnap's house, Mr. Belnap would not have incurred the loss in the burglary.

Additionally, the order for restitution violated federal and state constitutional guarantees of due process. Fundamental principles of due process guarantee a defendant the right to "examine and challenge the accuracy and reliability of the factual information upon which his sentence is based." State v. Gomez, 887 P.2d 853, 855 (Utah 1994). When the sentence includes an order for restitution, this guarantee remains applicable. In the absence of a conviction where the defendant is afforded an opportunity to answer and challenge the accusation, an order for restitution may not be imposed unless there is an admission of

responsibility. “For purposes of determining the basis of restitution, the admission of a defendant is essentially the same as a plea of guilty Because such an admission can result in liability for substantial sums of money, defendant’s responsibility for the criminal activities ought to be firmly established.” Watson, 1999 UT App. 273 ¶5.

Here, charges were not made, an opportunity to answer was not afforded, no evidence was presented by either party, and Ms. Mast was not convicted of the burglary of Mr. Belnap’s house. Further, Ms. Mast did not admit responsibility for the burglary. The sentencing court simply inferred from Ms. Mast’s admission of theft by receiving stolen property and her inability to provide further information about the burglary that she was responsible for the entire amount of loss. R. 71 [10-12]. This failure to afford Ms. Mast procedural due process is unconstitutional error and should be reversed.

ARGUMENT

- I. BECAUSE THE RESTITUTION STATUTE, UTAH CODE ANN. § 76-3-201, REQUIRES THE SENTENCING COURT TO FOCUS ON ADMISSIONS, AND NOT ON INFERENCES OR AN UNSPECIFIED “CIVIL STANDARD,” THE RESTITUTION ORDER IMPOSED UPON MS. MAST WAS ERRONEOUS

In ordering Ms. Mast to pay restitution of \$5,090, even though she was not convicted of and did not admit responsibility

for the burglary of Mr. Belnap's house, see R. 16-22, the trial court misinterpreted the restitution statute, Utah Code Ann. § 76-3-201(4) (a) (i) (1999). Section 76-3-201(4) (a) (i) states:

When a person is convicted of a criminal activity that has resulted in pecuniary damages, in addition to any other sentence it may impose, the court shall order that the defendant make restitution to victims of crime as provided in this subsection, or for conduct for which the defendant has agreed to make restitution as part of a plea agreement. . . .

Utah Code Ann. § 76-3-201(4) (a) (i) (1999).³ The statute defines "criminal activities," as "any offense of which the defendant is convicted or any other criminal conduct for which the defendant admits responsibility to the sentencing court with or without an admission of committing the criminal conduct." Utah Code Ann. § 76-3-201(1) (b) (1999).⁴

In interpreting this statute, this Court has indicated that, "[a] court may order restitution only if the defendant has been convicted of a crime that resulted in pecuniary damages and agrees to pay restitution or admits to the criminal conduct."

Watson, 1999 UT App. 273 ¶3. Additionally, "the statute requires

³ In interpreting this statute, the "fundamental rule of statutory construction is that statutes are to be construed according to their plain language.'" State Ex Re. N.K.C., 1999 UT App. 345 ¶9, 995 P.2d 1 (citation omitted).

⁴ Statutory definitions are a primary tool used in determining plain meaning. See State v. Watson, 1999 UT App. 273 ¶3, 987 P.2d 1289; State v. Galli, 967 P.2d 930, 937 (Utah 1998).

that responsibility for the criminal conduct be firmly established, much like a guilty plea, before the court can order restitution." Id. at ¶5. Further, as under the Oregon restitution statute that served as a model for the section 76-3-201, the "formalities of an admission [must be] met before restitution can be ordered." Id. (citing State v. Voetberg, 781 P.2d 387, 389 (Or. App. 1989)).

In this case, Ms. Mast was not ever convicted of and did not ever admit responsibility for the burglary of Mr. Belnap's house. She has always maintained that she had no knowledge of the burglary, did not participate in the burglary, and did not know who committed the burglary. See R. 16-22, R. 70 [4], R. 72[2-3]. Immediately before her arrest, she told police that a male friend had given her the checks and jewelry. R. 72 [2]. Later, when Ms. Mast pleaded guilty to the charge of theft by receiving stolen property, she admitted only that she "possessed the items of a former boyfriend, after they had been taken from his home in a burglary. The items 4 rings and a pocket watch were worth over \$1,000.00." R. 17. In the presentence investigation report, she further explained:

A couple of friends of my ex-boyfriend came to my apartment. They wanted me to go shopping with them. They had some jewelry that they gave me, we were all very high on meth. I went up to Target. The guy said he had some checks of his and we could buy some things we

needed. When it came time to cash the check he gave it to me and left. I thought it was his check but it wasn't. They come from a burglary that was done earlier The jewelry in my purse was also from the burglary.

R. 72 [3]. During her sentencing, the sentencing judge asked "Who actually did the burglary at Belnap's home, do you know?" R. 70 [4]. Ms. Mast responded, "I don't know. It - I don't know. It wasn't me, I was not up there." Id.

Nevertheless, the sentencing court imposed an order of restitution for \$5,090, the entire amount of loss in the burglary of Mr. Belnap's house. The court based its decision upon the reasoning that, under an unspecified "civil standard" Ms. Mast was liable for the entire amount of loss. The court also stated:

There, it seems to me, is such a close nexus in terms of time [between the burglary and when Ms. Mast was discovered with the checks and jewelry] and there is such a[n] insufficient explanation for how she acquired [the 4 rings and pocket watch] and it appears on the face of it to be just simply unreasonable and unbelievable, frankly. And Ms. Mast's refusal to provide any additional information on which I could - I could base any other ruling, I'll find that the State through the pre[]sentence report in fact has established to a sufficient civil standard, [] Ms. Mast's participation in a criminal activity resulting in an economic loss

R. 71 [12-13]. This ruling is erroneous because the court looked beyond the admitted crime and based its ruling upon inferences made from the "close nexus in terms of time" and Ms. Mast's failure to provide further information regarding the person or

persons who gave her the stolen items.

In State v. Watson this Court ruled that an order of restitution based upon inferences extending beyond the specific admission made to the sentencing court was not consistent with section 76-3-201. Watson, 1999 UT App. 273 ¶5, 987 P.2d 1289. In Watson, the defendant pleaded guilty to attempted obstruction of justice after allegedly driving two other suspects to and from a crime scene. Id. at ¶2. She also admitted to selling the car used in the crime. Id.

The sentencing court ordered her to pay restitution to the Victim's Reparation Fund for money it gave to the victim's family for counseling. Id. at ¶1. In issuing this order, the sentencing court stated:

[T]he defendant did admit to the responsibility of driving this vehicle. And in this court's opinion also, [defense counsel], in spite of the fact that you maintain that some of the facts are disputed, I am just of the opinion that there are sufficient facts, substantial as they may be, which are reflective of the defendant's state of mind in this particular case; i.e., hearing the shots, individuals running towards the vehicle, her admission that she drove the vehicle away. In this court's opinion [that] is sufficient nexus to hold her accountable for restitution

Id. at ¶4. This Court reversed that order, clarifying that "the statute is more narrow." Id. at ¶5. Specifically, the statute "does not ask the trial court to analyze a defendant's state of mind, but rather asks it to focus on admissions made to the

sentencing court." Id. Because the defendant admitted only to the obstruction of justice charge, and there was no "firmly established admission of responsibility upon which to order Watson to pay restitution," this Court reversed. Id. at ¶5.

Similarly, in State v. Galli, the Utah Supreme Court held that the sentencing court incorrectly interpreted section 76-3-201 in ordering the defendant to pay restitution to his family for bail money they forfeited when he absconded from the jurisdiction after being released on bail. Galli, 967 P.2d 930, 937-38 (Utah 1998). The Court observed that "Galli was neither charged nor convicted of bail jumping Thus, the only way that his family could be victims of bail jumping would be if Galli admitted responsibility for this crime to Judge Brian." Id. Although Galli's defense counsel made statements admitting bail jumping, Galli himself did not, and therefore restitution was not proper under section 76-3-201. Id.

In this case, Ms. Mast has already restored the items which she was in possession of, R. 71 [9],⁵ and the only basis for

⁵Under the plain language of section 76-3-201(4)(a)(i), Ms. Mast can be ordered to make restitution only for pecuniary damages resulting from her admitted crime of theft by receiving stolen property. See Watson, 1999 UT App. 273 ¶3. In her plea agreement, she admitted that she had ". . . 4) received the property of Curtis Belnap 5) knowing the property had been stolen 6) intending to deprive the owner 7) property consisting of 4 rings and a pocket watch worth \$1,020.00." R. 17. Ms. Mast also

ordering further restitution is the burglary of Mr. Belnap's house. Ms. Mast was not convicted of and did not admit responsibility for that burglary. See R. 16-22. The trial court found responsibility for losses from that burglary solely on the basis of inferences from Ms. Mast's inability to provide further information concerning the burglary. This was erroneous because Section 76-3-201 does not contemplate restitution based upon inferences or speculation.

Additionally, the sentencing court's order for restitution is erroneous because of the application of an unspecified "civil standard" to Ms. Mast's "criminal activity" of theft by receiving stolen property. The sentencing court's focus on this standard apparently stems from the definition of "pecuniary damages" in the restitution statute. "Pecuniary damages" are defined as "all special damages, but not general damages, which a person could recover against the defendant in a civil action arising out of the facts or events constituting the defendant's criminal activities and includes the money equivalent of property taken, destroyed, broken, or otherwise harmed, and losses including earnings and medical expenses." Utah Code Ann. § 76-3-

admitted, through her attorney, responsibility for these items. R. 71 [9]. However, she specifically disclaimed responsibility for the value of the remaining losses from the burglary. R. 71 [8-9].

201(1)(c)(1999).

Under this definition, this Court has found that "a modified 'but for' test is appropriate in the context of a restitution hearing" State v. McBride, 940 P.2d 539, 544 (Utah Ct. App. 1997). Generally, this test is applied in cases where crimes of negligence are at issue because of the difficulty of determining whether damages resulted from the act of negligence.⁶ The test is also used to determine whether parties are victims entitled to retribution under the statute.⁷

However, where the crime is one of criminal intent rather than negligence, the modified "but for" test is not useful because pecuniary damages are easier to trace, or not trace, to the crime.⁸ The focus turns to the specific admissions made to

⁶ See e.g. McBride, 940 P.2d at 544 (Where defendant was convicted of joyriding, this Court applied a "modified 'but for' test" to determine whether restitution was appropriate); State v. Robinson, 860 P.2d 979, 982 (Utah Ct. App. 1993) ("Unlike most criminal matters, these traffic cases involve numerous issues that must be considered before it can be determined whether a victim 'has suffered pecuniary damages as a result of the defendant's criminal activities.'")

⁷ See e.g. State v. Depaoli, 835 P.2d 162, 164 (Utah 1992) ("Because the cost of the [rape examination] could not be recovered by the SLCPD in a civil action against defendant, the SLCPD has not sustained pecuniary damages as defined by our statute and therefore is not a victim.")

⁸ See e.g. Watson, 1999 UT App. 273 ¶5 ("Without making inferences as the trial court did, it cannot be said that Watson admitted responsibility for the murder nor did she agree to pay restitution. Watson only admitted and pleaded guilty to the

the court, and not to the modified "but for" test.⁹ In this case, the sentencing court focused on an unspecified "civil standard" in ordering restitution. The court reasoned that, "as the finder of fact and sentencing judge in this matter . . . should I go beyond the specific offense for which she was convicted, i.e., theft by receiving? I think the answer is yes, but only if there is to at least a civil standard, a showing that the-of the criminal activity, part of which was the specific offense for which she was convicted." R. 71 [12]. The sentencing court found that the information in the presentence investigation report met the "civil standard," R. 71 [13], and restitution was imposed. Because the sentencing court focused on this unspecified "civil standard" in ordering restitution, rather than on the specific

obstruction of justice charge for which there were no pecuniary damages. Thus, there was no firmly established admission of responsibility upon which to order Watson to pay restitution."); State v. Simonette, 881 P.2d 963, 964 (Utah 1994) (Where child sustained damages for physical abuse, and defendant admitted physically abusing the child, trial court properly ordered restitution even though defendant was not convicted of the crime of abusing the child.)

⁹ See e.g. Galli, 967 P.2d at 937 (Foregoing a "but for" analysis, the Utah Supreme Court noted that "Galli was neither charged nor convicted of bail jumping Thus, the only way that his family could be victims of bail jumping would be if Galli admitted responsibility for this crime to Judge Brian."); Watson, 1999 UT App. 273 ¶5, (In rejecting the sentencing court's order of restitution based upon a "but for" test, this Court stated, "the statute requires that responsibility for the criminal conduct be firmly established, much like a guilty plea, before the court can order restitution.")

admissions made before the court, the order for restitution was erroneous.

Finally, even applying the modified "but for" test, the order for restitution was erroneous. That test, adopted from an Oregon court, indicates that "'if the loss 'resulted,' in a 'but for' sense, from defendant's criminal activities,'" restitution is proper in the amount "'equivalent of the property for the taking or destruction of which the defendant could be found civil[l]y liable.'" McBride, 940 P.2d at 544 (quoting State v. Doty, 653 P.2d 276, 277-78 (1982)). Here, it cannot be said that "but for" Ms. Mast's acceptance of the checks, rings, and pocket watch from a friend, Mr. Belnap's losses from an earlier burglary would not have resulted. Mr. Belnap's losses from the burglary were not the result of Ms. Mast's admitted crime of theft by receiving stolen property. Indeed, Ms. Mast did not even commit her admitted crime until after the losses were incurred. Therefore, the order for restitution was erroneous.

II. THE ORDER IMPOSING RESTITUTION VIOLATED PROCEDURAL DUE PROCESS BECAUSE MS. MAST, WHO DID NOT ADMIT RESPONSIBILITY FOR THE RELATED BURGLARY, WAS NOT CHARGED WITH, PROVEN GUILTY OF, OR CONVICTED OF THE BURGLARY

Without the protections of procedural due process, Ms. Mast did not have the opportunity to answer the charge of burglary,

she could not confront witnesses or present evidence on her behalf, and she was not proven guilty beyond a reasonable doubt. Procedural Due Process is guaranteed by the Fifth Amendment of the United States Constitution and Article I, section 7 of the Utah Constitution. U.S. Const. amend. V.; Utah Const., art. 1 § 7. The United States Supreme Court has declared that "[e]very person has a fundamental right to liberty in the sense that the Government may not punish him unless and until it proves his guilt beyond a reasonable doubt at a criminal trial conducted in accordance with the relevant constitutional guarantees." Chapman v. United States, 500 U.S. 453, 465, 111 S.Ct. 1919, 114 L.Ed.2d 524 (1991).¹⁰

With regard to the imposition of restitution, this Court has indicated that "[t]he demands of due process rest on the concept of basic fairness of procedure and demand a procedure appropriate to the case and just to the parties involved." State v. Robinson, 860 P.2d 979, 982 (Utah Ct. App. 1993)(citations omitted).

¹⁰The Court has also declared, "[d]ating back to Magna Carta . . . it has been an abiding principle governing the lives of civilized men that 'no freeman shall be taken or imprisoned or disseised or outlawed or exiled . . . without the judgment of his peers or by the law of the land (Footnote omitted). What we hold is only that, in keeping with this cherished tradition, punishment cannot be imposed 'without due process of law.' Any lesser holding would ignore the constitutional mandate upon which our essential liberties depend." Kennedy v. Mendoza-Martinez, 372 U.S. 144, 186 (1963).

Further, "[o]ne of the fundamental requisites of due process is the opportunity to be fully heard." Id. (citations omitted). Specifically, "[e]very significant deprivation, whether permanent or temporary, of an interest, which is qualified as 'property' under the due process clause must be preceded by notice and opportunity for hearing appropriate to the nature of the case, absent extraordinary or unusual circumstances." Id. (citations omitted).

In this case, procedural due process was not followed. Charges of the underlying burglary were not made, an opportunity to answer was not afforded, no evidence was presented by either the State or Ms. Mast, and Ms. Mast was not convicted of the burglary. During the hearing on Ms. Mast's motion to alter or amend judgment, the court, acknowledging that the State could not prove beyond a reasonable doubt that Ms. Mast committed the burglary, R. 71 [10],¹¹ based its imposition of restitution upon an inference of responsibility. See R. 71 [10-12]. The court also indicated that it found that Ms. Mast's "criminal activity" of theft by receiving stolen property met an unspecified "civil

¹¹ During the hearing on Ms. Mast's motion to alter or amend judgment, the sentencing judge indicated that "There's absolutely no way [the State] could prove beyond a reasonable doubt that she committed the burglary, they can't put her at the crime scene, either. She's presumed innocent. There is no plausible way that she should be charged with the burglary" R. 71 [10].

standard" required to impose restitution under the restitution statute, Utah Code Ann. § 76-3-201(1999). R. 71 [12-13].

The sentencing court's ruling violates procedural due process because due process requires more than an inference of responsibility during a sentencing proceeding on another matter.¹² With regard to sentencing proceedings, the Utah Supreme Court has indicated that federal and state due process entitles a defendant "to due process protections during sentencing to prevent procedural unfairness." State v. Gomez, 887 P.2d 853, 854-55 (Utah 1994). In fact, "[p]rocedural fairness is equally mandated at the sentencing phase as at the guilt phase of a trial." State v. Sanwick, 713 P.2d 707, 708 (Utah 1986). Further, "[f]undamental principles of procedural fairness in sentencing

¹² When a defendant has not admitted responsibility for a crime, or been convicted of the crime, the Utah Supreme Court has held it a violation of due process to impose restitution. See ie State in Interest of Schroeder, 598 P.2d 373, 374-75 (Utah 1979) (Where a juvenile admitted to damaging a motor home, "[i]t seems to us that it would be a distortion of justice, and of due process, for the court to simply assume that other damages caused in the area (in this instance the other four motor homes) were chargeable to wrongful conduct of this juvenile; and to impose that damage as a penalty where, as is the situation here, there was no evidence offered, and no admission of guilt on his part, upon which to place upon him the responsibility for that damage."); In the Matter of Cache Valley Syndicate Trust, 587 P.2d 525, 528 (Utah 1978) ("It is not consistent with established concepts of equity or due process . . . for the court to disfranchise . . . without evidence in support thereof" the wife of a trust employee who pleaded guilty to charges of felonious misconduct with regard to management of the trust.)

require that a defendant have the right to examine and challenge the accuracy and reliability of the factual information upon which his sentence is based." Gomez, 887 P.2d at 855. Finally, "[w]here it is shown on appeal that the belief that the defendant may have committed a crime on another occasion is without support," sentences have been vacated. State v. Howell, 707 P.2d 115, 118 n.2 (Utah 1985) (citations omitted).

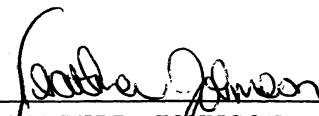
In this case, there is no basis for making Ms. Mast responsible for losses related to the burglary of Mr. Belnap's house. Although Ms. Mast admitted to theft by receiving stolen property, she returned the property which she had been in possession of. R. 71 [9]. Inferences of responsibility for losses from the underlying burglary are not permissible under principles of due process. No evidence concerning the burglary was presented, no opportunity to challenge the evidence was given, and Ms. Mast has continually maintained her lack of knowledge regarding the burglary. See R. 16-22, R. 70 [4], R. 72[2-3]. Most significantly, no admission of responsibility for the burglary was made. A formal admission of responsibility is required under principles of due process because "[f]or the purposes of determining the basis for restitution, the admission of a defendant is essentially the same as a plea of guilty Because such an admission can result in liability for substantial

sums of money, defendant's responsibility for the criminal activities ought to be firmly established." Watson, 1999 UT App. 273 ¶5. Because Ms. Mast did not admit responsibility for the burglary underlying Mr. Belnap's losses, the order to pay restitution violates procedural due process.

CONCLUSION

Ms. Mast respectfully requests that the order imposing restitution be reversed. The sentencing court's imposition of the order as a condition of Ms. Mast's probation constitutes a misinterpretation of the restitution statute, Utah Code Ann. § 76-3-201(4)(a)(i)(1999). Additionally, the order violates constitutional guarantees of due process because there was not an admission of responsibility, and Ms. Mast was not charged with or convicted of the underlying crime.

RESPECTFULLY SUBMITTED this 17th day of January, 2001.

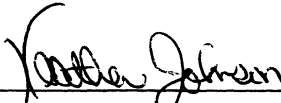


HEATHER JOHNSON
Attorney for Defendant/Appellant

JARED W. ELDRIDGE
Attorney for Defendant/Appellant

CERTIFICATE OF DELIVERY

I, HEATHER JOHNSON, hereby certify that I have caused to be hand-delivered eight copies of the foregoing to the Utah Court of Appeals, 450 South State Street, Salt Lake City, Utah 84114-0230, and four copies to the Utah Attorney General's Office, Heber M. Wells Building, 160 East 300 South, Third Floor, P.O. Box 140854, Salt Lake City, Utah 84114-0854, this 17th day of January, 2001.



HEATHER JOHNSON

DELIVERED to the Utah Court of Appeals and the Utah Attorney General's Office as indicated above this ____ day of January, 2001.

ADDENDA

ADDENDUM A

THIRD DISTRICT COURT-SALT LAKE COURT
SALT LAKE COUNTY, STATE OF UTAH

STATE OF UTAH,	:	MINUTES
Plaintiff,	:	SENTENCE, JUDGMENT, COMMITMENT
	:	
	:	
vs.	:	Case No: 001903706 FS
	:	
TARA KAY MAST,	:	Judge: ROGER A. LIVINGSTON
Defendant.	:	Date: August 28, 2000

PRESENT

Clerk: chandeei

Defendant

Defendant's Attorney(s): ELDRIDGE, JARED W.

DEFENDANT INFORMATION

Date of birth: August 3, 1968

Video

Tape Count: 2:14

CHARGES

2. THEFT BY RECEIVING STOLEN PROPERTY - 3rd Degree Felony
Plea: Guilty - Disposition: 05/11/2000 Guilty Plea

SENTENCE PRISON

Based on the defendant's conviction of THEFT BY RECEIVING STOLEN PROPERTY a 3rd Degree Felony, the defendant is sentenced to an indeterminate term of not to exceed five years in the Utah State Prison.

The prison term is suspended.

SENTENCE JAIL

Based on the defendant's conviction of THEFT BY RECEIVING STOLEN PROPERTY a 3rd Degree Felony, the defendant is sentenced to a term of 180 day(s)

Credit is granted for time served.

Case No: 001903706
Date: Aug 28, 2000

SENTENCE JAIL SERVICE NOTE

C/o deft to serve 180 days jail, cts, concurrent.

SENTENCE FINE

Charge # 2 Fine: \$1000.00
 Suspended: \$1000.00
 Surcharge: \$

 Total Fine: \$1000.00
 Total Suspended: \$1000.00
 Total Surcharge: \$0
Total Principal Due: \$0
 Plus Interest

SENTENCE TRUST

The defendant is to pay the following:
Attorney Fees: Amount: \$200.00 Plus Interest
Pay in behalf of: SALT LAKE LEGAL DEFENDARS

ORDER OF PROBATION

The defendant is placed on probation for 3 year(s).
Probation is to be supervised by Adult Probation & Parole.
Defendant to serve 180 day(s) jail.

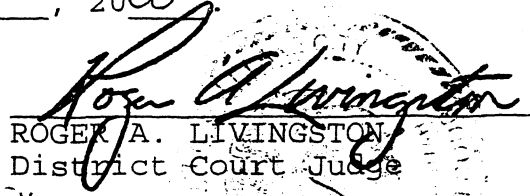
PROBATION CONDITIONS

Usual and ordinary conditions required by the Department of Adult Probation & Parole.
Submit to searches of person and property upon the request of any Law Enforcement Officer.
Do not use, consume or possess alcohol or illegal drugs, nor associate with any people using, possessing or consuming alcohol or illegal drugs.
Submit to tests of breath and urine upon the request of any Law Enforcement Officer.
Participate in and complete any educational; and/or vocational training as directed by the Department of Adult Probation and

Case No: 001903706
Date: Aug 28, 2000

Parole.
Violate no laws.
Enter, participate in, and complete any program, counseling, or treatment as directed by the Department of Adult Probation and Parole.
Pay restitution as determined by Probation Officer.
Submit to drug testing.
Not frequent any place where drugs are used, sold, or otherwise distributed illegally.
Refrain from the use of alcoholic beverages.
Report regularly
Maintain fulltime employment

Dated this 28 day of August, 2000



ROGER A. LIVINGSTON
District Court Judge

by _____
TAMP USED AT DIRECTION OF JUDGE

ADDENDUM B

76-3-201. Definitions — Sentences or combination of sentences allowed — Civil penalties — Restitution — Hearing.

- (1) As used in this section:
 - (a) "Conviction" includes a:
 - (i) judgment of guilt; and
 - (ii) plea of guilty.
 - (b) "Criminal activities" means any offense of which the defendant is convicted or any other criminal conduct for which the defendant admits responsibility to the sentencing court with or without an admission of committing the criminal conduct.
 - (c) "Pecuniary damages" means all special damages, but not general damages, which a person could recover against the defendant in a civil action arising out of the facts or events constituting the defendant's criminal activities and includes the money equivalent of property taken, destroyed, broken, or otherwise harmed, and losses including earnings and medical expenses.
 - (d) "Restitution" means full, partial, or nominal payment for pecuniary damages to a victim, including the accrual of interest from the time of sentencing, insured damages, and payment for expenses to a governmental entity for extradition or transportation and as further defined in Subsection (4)(c).
 - (e)
 - (i) "Victim" means any person whom the court determines has suffered pecuniary damages as a result of the defendant's criminal activities.
 - (ii) "Victim" does not include any coparticipant in the defendant's criminal activities.
- (2) Within the limits prescribed by this chapter, a court may sentence a person convicted of an offense to any one of the following sentences or combination of them:
 - (a) to pay a fine;
 - (b) to removal or disqualification from public or private office;
 - (c) to probation unless otherwise specifically provided by law;
 - (d) to imprisonment;
 - (e) to life imprisonment;
 - (f) on or after April 27, 1992, to life in prison without parole; or
 - (g) to death.
- (3)
 - (a) This chapter does not deprive a court of authority conferred by law to:
 - (i) forfeit property;
 - (ii) dissolve a corporation;
 - (iii) suspend or cancel a license;
 - (iv) permit removal of a person from office;
 - (v) cite for contempt; or
 - (vi) impose any other civil penalty.
 - (b) A civil penalty may be included in a sentence.

(4) (a) (i) When a person is convicted of criminal activity that has resulted in pecuniary damages, in addition to any other sentence it may impose, the court shall order that the defendant make restitution to victims of crime as provided in this subsection, or for conduct for which the defendant has agreed to make restitution as part of a plea agreement. For purposes of restitution, a victim has the meaning as defined in Subsection (1)(e).

(ii) In determining whether restitution is appropriate, the court shall follow the criteria and procedures as provided in Subsections (4)(c) and (4)(d).

(iii) If the court finds the defendant owes restitution, the clerk of the court shall enter an order of complete restitution as defined in Subsection (8)(b) on the civil judgment docket and provide notice of the order to the parties.

(iv) The order is considered a legal judgment enforceable under the Utah Rules of Civil Procedure, and the person in whose favor the restitution order is entered may seek enforcement of the restitution order in accordance with the Utah Rules of Civil Procedure. In addition, the Department of Corrections may, on behalf of the person in whose favor the restitution order is entered, enforce the restitution order as judgment creditor under the Utah Rules of Civil Procedure.

(v) If the defendant fails to obey a court order for payment of restitution and the victim or department elects to pursue collection of the order by civil process, the victim shall be entitled to recover reasonable attorney's fees.

(vi) A judgment ordering restitution constitutes a lien when recorded in a judgment docket and shall have the same effect and is subject to the same rules as a judgment for money in a civil action. Interest shall accrue on the amount ordered from the time of sentencing.

(vii) The Department of Corrections shall make rules permitting the restitution payments to be credited to principal first and the remainder of payments credited to interest in accordance with Title 63, Chapter 46a, Utah Administrative Rulemaking Act.

(b) (i) If a defendant has been extradited to this state under Title 77, Chapter 30, Extradition, to resolve pending criminal charges and is convicted of criminal activity in the county to which he has been returned, the court may, in addition to any other sentence it may impose, order that the defendant make restitution for costs expended by any governmental entity for the extradition.

(ii) In determining whether restitution is appropriate, the court shall consider the criteria in Subsection (4)(c).

(c) In determining restitution, the court shall determine complete restitution and court-ordered restitution.

(i) Complete restitution means the restitution necessary to compensate a victim for all losses caused by the defendant.

(ii) Court-ordered restitution means the restitution the court having criminal jurisdiction orders the defendant to pay as a part of the criminal sentence at the time of sentencing.

(iii) Complete restitution and court-ordered restitution shall be determined as provided in Subsection (8).

- (d) (i) If the court determines that restitution is appropriate or inappropriate under this subsection, the court shall make the reasons for the decision a part of the court record.
 - (ii) In any civil action brought by a victim to enforce the judgment, the defendant shall be entitled to offset any amounts that have been paid as part of court-ordered restitution to the victim.
 - (iii) A judgment ordering restitution constitutes a lien when recorded in a judgment docket and shall have the same effect and is subject to the same rules as a judgment for money in a civil action. Interest shall accrue on the amount ordered from the time of sentencing.
 - (iv) The Department of Corrections shall make rules permitting the restitution payments to be credited to principal first and the remainder of payments credited to interest in accordance with Title 63, Chapter 46a, Utah Administrative Rulemaking Act.
 - (e) If the defendant objects to the imposition, amount, or distribution of the restitution, the court shall at the time of sentencing allow the defendant a full hearing on the issue.
- (5) (a) In addition to any other sentence the court may impose, the court shall order the defendant to pay restitution of governmental transportation expenses if the defendant was:
- (i) transported pursuant to court order from one county to another within the state at governmental expense to resolve pending criminal charges;
 - (ii) charged with a felony or a class A, B, or C misdemeanor; and
 - (iii) convicted of a crime.
- (b) The court may not order the defendant to pay restitution of governmental transportation expenses if any of the following apply:
- (i) the defendant is charged with an infraction or on a subsequent failure to appear a warrant is issued for an infraction; or
 - (ii) the defendant was not transported pursuant to a court order.
- (c) (i) Restitution of governmental transportation expenses under Subsection (5)(a)(i) shall be calculated according to the following schedule:
- (A) \$75 for up to 100 miles a defendant is transported;
 - (B) \$125 for 100 up to 200 miles a defendant is transported;
- and
- (C) \$250 for 200 miles or more a defendant is transported.
- (ii) The schedule of restitution under Subsection (5)(c)(i) applies to each defendant transported regardless of the number of defendants actually transported in a single trip.
- (6) (a) If a statute under which the defendant was convicted mandates that one of three stated minimum terms shall be imposed, the court shall order imposition of the term of middle severity unless there are circumstances in aggravation or mitigation of the crime.
- (b) Prior to or at the time of sentencing, either party may submit a statement identifying circumstances in aggravation or mitigation or presenting additional facts. If the statement is in writing, it shall be filed with the court and served on the opposing party at least four days prior to the time set for sentencing.
- (c) In determining whether there are circumstances that justify imposition of the highest or lowest term, the court may consider the record in

the case, the probation officer's report, other reports, including reports received under Section 76-3-404, statements in aggravation or mitigation submitted by the prosecution or the defendant, and any further evidence introduced at the sentencing hearing.

(d) The court shall set forth on the record the facts supporting and reasons for imposing the upper or lower term.

(e) In determining a just sentence, the court shall consider sentencing guidelines regarding aggravating and mitigating circumstances promulgated by the Sentencing Commission.

(7) If during the commission of a crime described as child kidnaping, rape of a child, object rape of a child, sodomy upon a child, or sexual abuse of a child, the defendant causes substantial bodily injury to the child, and if the charge is set forth in the information or indictment and admitted by the defendant, or found true by a judge or jury at trial, the defendant shall be sentenced to the highest minimum term in state prison. This subsection takes precedence over any conflicting provision of law.

(8) (a) For the purpose of determining restitution for an offense, the offense shall include any criminal conduct admitted by the defendant to the sentencing court or to which the defendant agrees to pay restitution. A victim of an offense, that involves as an element a scheme, a conspiracy, or a pattern of criminal activity, includes any person directly harmed by the defendant's criminal conduct in the course of the scheme, conspiracy, or pattern.

(b) In determining the monetary sum and other conditions for complete restitution, the court shall consider all relevant facts, including:

(i) the cost of the damage or loss if the offense resulted in damage to or loss or destruction of property of a victim of the offense;

(ii) the cost of necessary medical and related professional services and devices relating to physical, psychiatric, and psychological care, including nonmedical care and treatment rendered in accordance with a method of healing recognized by the law of the place of treatment; the cost of necessary physical and occupational therapy and rehabilitation; and the income lost by the victim as a result of the offense if the offense resulted in bodily injury to a victim; and

(iii) the cost of necessary funeral and related services if the offense resulted in the death of a victim.

(c) In determining the monetary sum and other conditions for court-ordered restitution, the court shall consider the factors listed in Subsection (8)(b) and:

(i) the financial resources of the defendant and the burden that payment of restitution will impose, with regard to the other obligations of the defendant;

(ii) the ability of the defendant to pay restitution on an installment basis or on other conditions to be fixed by the court;

(iii) the rehabilitative effect on the defendant of the payment of restitution and the method of payment; and

(iv) other circumstances which the court determines make restitution inappropriate.

(d) The court may decline to make an order or may defer entering an order of restitution if the court determines that the complication and prolongation of the sentencing process, as a result of considering an order of restitution under this subsection, substantially outweighs the need to provide restitution to the victim.